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IN THE

# Supreme Court of the United States

October Term, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.,
*Petitioners,*

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND
UNITED FARM WORKERS OF AMERICA, AFL-CIO,
*Respondents.*

## Petition for a Writ of Certiorari to the Supreme Court of the State of California

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## QUESTION PRESENTED

A California non-judicial administrative agency has ordered petitioners to pay potentially millions of dollars to workers represented by the United Farm Workers Union. California has foreclosed petitioners' right to *any* judicial determination of the legality of that order. California nevertheless mandates that the unreviewed order be enforced by its courts. Accordingly, petitioners present the following question:

Does the due process clause of the Fourteenth Amendment prohibit a state from taking away the right to have a court determine the legality of an administrative order that will deprive a party of substantial property?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Abatti Farms, Inc., a California corporation

Abatti Produce, Inc., a California corporation

The Agricultural Labor Relations Board

United Farm Workers of America, AFL-CIO

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**Petition for a Writ of Certiorari**
**to the Supreme Court of the State of California**

## OPINIONS BELOW

The opinions of Administrative Law Officer David Nevins and of the Agricultural Labor Relations Board are reported at 7 ALRB No. 36 (October 28, 1981) and reproduced as Appendix A.

Neither the California Court of Appeal nor the California Supreme Court granted review or wrote an opinion. Their orders denying the petitions for writ of review and for hearing are reproduced in Appendices C and E, respectively.

## JURISDICTION

The judgment of the California Supreme Court denying the petition for hearing from the Court of Appeal, Fourth Appellate District, was entered on May 4, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1976).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution provides:

*Fourteenth Amendment.*

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

The California Constitution provides:

*Art. III § 3.5.*

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations

* * *

*Art. VI § 11.*

The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.

The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

* * *

*Art. VI § 14.*

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

* * *

The California Agricultural Labor Relations Act provides:

*Labor Code § 1148.*

The Board shall follow applicable precedents of the National Labor Relations Act, as amended.

*Labor Code § 1160.8.*

Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such

person resides or transacts business, by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

An order directing an election shall not be stayed pending review, but such order may be reviewed as provided in Section 1158.

If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. The court shall not review the merits of the order.

* * *

## STATEMENT OF THE CASE

Petitioners Abatti Farms, Inc. and Abatti Produce, Inc. ("Abatti") are California corporations growing, harvesting and marketing agricultural produce in California's Imperial Valley. On November 18, 1977, the California Agricultural Labor Relations Board ("ALRB") certified the United Farm Workers of America, AFL-CIO ("UFW") as the collective bargaining representative of Abatti's agricultural employees. The UFW and Abatti later signed a collective bargaining agreement.

Dissatisfaction with the UFW soon surfaced among Abatti workers. In November 1978, two Abatti employees — Toribio Cruz and Manuel Castellanos — circulated petitions for a decertification election. The ALRB held an election on December 27, 1978, and Abatti workers voted to decertify the UFW. After losing the election, the UFW filed with the ALRB election objections and unfair labor practice charges against Abatti.

After hearing, an ALRB-appointed administrative law officer set aside the decertification election, finding that Abatti had assisted Cruz and Castellanos in their decertification efforts. With minor modifications, the ALRB adopted the officer's decision on October 28, 1981.

The ALRB ordered Abatti to "make-whole" the UFW-represented employees by paying approximately one thousand workers the difference between their actual wages and benefits and the significantly more costly wages and benefits in selected UFW contracts with other farmers. The award is retroactive to January 1979, and mounts until Abatti signs a new collective bargaining agreement with the UFW or bargains in good faith to an ALRB-approved impasse. The ALRB proposes to fix, in a separate proceeding, the amount Abatti must pay under the "make-whole" remedy; that amount may be millions of dollars.

Abatti timely sought review in the California Court of Appeal. Abatti challenged the fairness of the ALRB proceedings and the legality of the ALRB findings and order.[1] Without stating any grounds, the Court of Appeal summarily refused to review the ALRB order.[2]

Abatti timely filed a petition for hearing in the California Supreme Court. That petition set forth Abatti's objections to the ALRB decision and to the summary denial of review by the Court of Appeal. Abatti argued that judicial determination by the Court of Appeal of the legality and fairness of the ALRB proceeding was constitutionally compelled, and that the refusal by that court even to consider Abatti's claims was a denial of federal due process.[3] By postcard dated May 4, 1983, the

[1] Abatti's brief in the Court of Appeal is Appendix B. The ALRB's order was—in Abatti's view—manifestly unlawful under California law. The order was the product of agency bias and willful disregard of its statutory mandate. *See* Appendix B; see also Lieberman, *NLRA Precedent in ALRB Decisions: Legislative Intent or Administrative Fiat?* (Cal. State Univ. 1982). The remedy—"make whole"—was wholly unwarranted under the facts of the case and California Supreme Court precedent. Appendix B, pp. 29-33. These state law issues are not before the Court; California's refusal to provide any judicial forum in which they may be determined *is*.

[2] Appendix C.

[3] Appendix D, pp. 40-49. The denial of due process under the Fourteenth Amendment thus arose only upon the Court of Appeal's refusal to review the ALRB order. Abatti raised the federal issue at its first available opportunity, by petition for hearing to the California Supreme Court. The California Supreme Court's postcard denial of Abatti's petition does not discuss the federal constitutional issue Abatti raised there. That does not preclude this Court's resolving the issue, however. *Street* v. *New York*, 384 U.S. 576, 581-584 (1968); *Chambers* v. *Mississippi*, 410 U.S. 284, 290, n. 3 (1973). The petition to the California Supreme Court shows the constitutional issue was squarely presented. When the record shows by clear implication that the federal question was adequately presented, this Court has jurisdiction to examine the claim. *Webb* v. *Webb*, 452 U.S.493, 496-497 (1981); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655 (1897).

California Supreme Court also summarily denied Abatti's petition with no determination on the merits.[4]

## REASONS FOR GRANTING THE WRIT

Whatever else due process may mean, it surely requires that a person whose property is to be taken by court order is entitled at some point to have some court tell him the taking is legal. Under the California procedure for enforcement of ALRB orders, the *only* court with jurisdiction to determine the validity of the ALRB order is the Court of Appeal. Under California law, as enacted, the Court of Appeal is required to make this determination before the order may be enforced.

The California Supreme Court recently eliminated the mandate that Courts of Appeal determine the legality of ALRB orders; such courts now have discretion to decide whether or not they will review ALRB orders on the merits.

Like 80% of those seeking Court of Appeal review since the elimination of mandatory review, Abatti received no review on the merits. As the matter now stands, the Superior Court is required to enforce the ALRB's order, but it has no jurisdiction to determine its legality. Abatti faces deprivation of substantial property, by court process, without any court ever determining the taking is legal.

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[4] Appendix E.

Abatti then instituted a federal civil action, *Abatti Farms, Inc.* v. *Agric. Lab. Rel. Bd.*, Civil Action No. 83-1111-E, United States District Court for the Southern District of California, seeking to enjoin the ALRB from initiating proceedings in the Superior Court to enforce its order until some court reviews it on the merits and adjudges it to be valid. The district court refused to issue a temporary restraining order, declining to interfere with state proceedings. *See* 28 U.S.C. § 2283 (the "Anti-Injunction Act").

Following the district court's decision, the ALRB began an action in California Superior Court to enforce its order. The Superior Court is prohibited from reviewing the merits of the ALRB's order. Cal. Lab. Code § 1160.8.

Whether a state may grant judicial enforcement to confiscatory orders of a non-judicial adminstrative agency, and yet deny aggrieved parties any right to have the enforcing court or, indeed, any court, anywhere, determine that the order is valid is an issue never before expressly decided by this Court. It demands resolution to avoid manifest injustice and to ensure vitality of the rule of law.

## I. CALIFORNIA HAS TAKEN AWAY ABATTI'S RIGHT TO HAVE A COURT DETERMINE THE LEGALITY AND FAIRNESS OF THE ALRB ACTION.

The California legislature enacted the Agricultural Labor Relations Act ("ALRA") in 1975 and modeled it after the National Labor Relations Act ("NLRA").[5] The statutes are for the most part identical. *Perry Farms, Inc.* v. *Agricultural Lab. Rel. Bd.*, 86 Cal.App.3d 448, 462, 150 Cal.Rptr. 495, 503 (1978). The ALRB is mandated to follow applicable NLRB precedent. Cal. Lab. Code § 1148 (West Supp. 1983). Substantive NLRB precedent — including precedent requiring judicial review on the merits before enforcement — was specifically incorporated as the body of law governing ALRB adjudications. *Nishiwaka Farms, Inc.* v. *Mahony*, 66 Cal.App.3d 781, 787, 136 Cal.Rptr. 233, 236 (1977). Neither agency has power to enforce its own orders. Both depend on courts and court process to achieve enforcement.

The judicial review provisions of the ALRA (Cal. Lab. Code § 1160.8 (West Supp. 1983)) and the NLRA (29 U.S.C. §§ 160(e) & (f) (1976)) both provide for review by petition to an appellate court. Both confer jurisdiction on that court by identical language:

> Upon the filing of such petition . . . the court shall have jurisdiction to grant the board such temporary relief or restraining order as it deems just and proper and in like manner to make and enter a decree

[5] Cal. Lab. Code § 1141, *et. seq.* (West Supp. 1983) and 29 U.S.C. § 141, *et seq.* (1976), respectively.

> enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. Cal. Lab. Code § 1160.8 (West Supp. 1983) and 29 US.C. §§ 160(e) & 160(f) (1976).

Both provide for the same standard of appellate review by identical language:

> The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. Cal. Lab. Code § 1160.8 (West Supp. 1983) and 29 U.S.C. § 160(f) (1976).

For 47 years federal courts have consistently read this language to create "an independent statutory proceeding initiated in the Court of Appeals" (*Kovach* v. NLRB, 229 F.2d 138, 141 (7th Cir. 1956)), in which the court is required to hear and consider objections from the aggrieved party (*Ford Motor Co.* v. *Labor Board*, 305 U.S. 364, 370 (1939)) and decline enforcement of the NLRB order if the court concludes the NLRB acted improperly (*Labor Board* v. *Warren Co.*, 350 U.S. 107, 112 (1955)). The jurisdiction conferred is appellate, not original. Review is not discretionary. Review is on the merits. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *see also*, Fed. Rules of App. Proc. 20.

This Court held the NLRA is constitutional because, *inter alia*, NLRB decisions can be enforced only after found by a court to be legally enforceable:

> The order of the Board is subject to review by the designated court and only when sustained by the court may the order be enforced. Upon that review, all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording ade-

> quate opportunity to secure judicial protection against arbitrary action . . . *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937).

The California counterpart, § 1160.8, also mandates judicial review on the merits. It directs the Court of Appeal to perform a judicial act — to "make and enter a decree enforcing, modifying . . . or setting aside" the ALRB order. Only after such review on the merits may the order be enforced. In enforcement proceedings, the Superior Court may not review the merits, since the legality of the order *presumably* has already been determined by the reviewing court. Thus, the Court of Appeal is the only forum in which the validity of the ALRB order may be determined. Cal. Lab. Code § 1160.8 (West Supp. 1983).

In *Perry Farms*, 86 Cal.App.3d at 465, 150 Cal.Rptr. at 503-504, the Court of Appeal upheld the constitutionality of the ALRA in part because it provided for review identical to the NLRA.

One year later, however, the California Supreme Court, in *Tex-Cal Land Management, Inc.* v. *Agricultural Lab. Rel. Bd.*, 24 Cal.3d 335, 350-351, 156 Cal.Rptr. 1, 9-10, 595 P.2d 579, 587-588 (1979) judicially excised the right to judicial review that the legislature had expressly provided. It held, instead, that ALRB decisions are reviewable only by application for an extraordinary prerogative writ — in the nature of mandamus — which, unlike an appeal, may be summarily denied without adjudication of the merits or statement of reasons.

The court cited no reason of policy or legislative intent in reaching its conclusion. It acknowledged that ALRA § 1160.8's federal counterpart, NLRA §§ 10(e) and (f), specifically provides for review on the merits as a matter of right:

> The absence from the federal scheme of judicial discretion to deny a petition for review without full consideration of the merits suggests the possibility that § 1160.8 review also is a matter of right. 24 Cal.3d at 348-349, 156 Cal.Rptr. at 9.

It acknowledged that Article VI, § 11 of the California Constitution creates appellate jurisdiction as a matter of right "in other causes prescribed by statute"—precisely the kind of appellate right granted in § 1160.8. Nevertheless, the court decided that the review described in § 1160.8 was more in the nature of a petition for extraordinary relief *solely* because § 1160.8 does not call for a "notice of appeal," but provides for a "petition."

Thus, notwithstanding (1) the plain language of § 1160.8, (2) the federal mandate for full review in identical NLRA provisions, (3) the incorporation of this federal mandate into California law (4) *Perry Farms'* reliance on this right to judicial review in upholding the ALRA and, (5) the availability of appellate jurisdiction under Article VI, § 11, the court held that courts of appeal may treat review of ALRB orders as purely discretionary review, available only if the reviewing court elects to engage in a full determination of the cause presented to it.

The regimen created by *Tex-Cal* would pose no particular constitutional vice[6] if courts of appeal still made determinations of the validity and enforceability of ALRB orders, albeit doing so within their mandamus jurisdictions. The problem is they do not. Since *Tex-Cal*, 80% of parties aggrieved by ALRB orders[7]—including Abatti—have had their requests for judicial determination of the legality of ALRB orders answered with only: "The petition for writ of review is denied." Appendix C.

Under California law these summary denials are not judicial determinations on the merits of the claim presented, nor judicial determinations that the ALRB decision and order is valid and enforceable. An appellate court determination on the merits, under California law, requires a written decision with

[6] The due process issue was not raised in *Tex-Cal*, nor brought to this Court—no doubt because the party aggrieved, Tex-Cal, had full judicial determination on the merits, once in the District Court of Appeal and again in the California Supreme Court.

[7] *See* ALRB Cumulative Litigation Results, published by the ALRB, Appendix F.

reasons stated. Cal. Const. art. VI § 14. Abatti has not been told that the ALRB order is valid, or legal, or enforceable. Abatti has not been told that its claim of invalidity lacks merit. Abatti has only been told that its request that the Court of Appeal intervene and determine whether the ALRB order is legal is "denied."

*Tex-Cal* held that:

> [T]he functions assigned a Court of Appeal by Section 1160.8 are within its original jurisdiction over a proceeding 'For extraordinary relief in the nature of mandamus.' (Art. VI, § 10). 24 Cal. 3d at 350, 156 Cal. Rptr. at 9-10, 595 P.2d at 587-588.

It has long been the law in California that denial of an application for an extraordinary writ without opinion or statement of reasons is not on the merits, and does not constitute a "judicial determination of a cause" within the meaning of Cal. Const. art. VI § 14. *People* v. *Medina*, 6, Cal.3d 484, 490-491, *99* Cal. Rptr. *630, 634, 492* P.2d *686, 689-690 (1972); Funeral Directors Assn.* v. *Board of Funeral Directors*, 22 Cal. 2d 104, 106, *136* P.2d *785, 786* (1943).

Moreover, in its mandamus jurisdiction an appellate court is not being asked to determine whether the order before it is valid and enforceable. It is being asked to perform the extraordinary act of intervention in the affairs of a subordinate body, and typically will not do so unless the issues presented are "novel" or of general importance.[8] Its jurisdiction is akin to the certiorari jurisdiction of this Court.

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[8] *Randone* v. *Appellate Dept.*, 5 Cal.3d 536, 542-543, 96 Cal.Rptr. 709, 719, 489 P.2d 13, 16 (1971); *American Nat'l Liab. Ins. Co.* v. *Superior Court*, 38 Cal.App.3d 579, 589, 113 Cal.Rptr. 561, 569 (1974).

A comparison of NLRB and ALRB operating statistics make clear that California Courts of Appeal are not according aggrieved parties full review on the merits.

Despite its 47 years of experience, NLRB decisions were affirmed in full by the Circuit Courts of Appeals in only 70.9 percent of the 1,458 review or

*Footnote continued on next page*

The ALRB is at this very moment seeking to enforce its order in Superior Court proceedings, in which that court "shall not review the merits of the order." Cal. Lab. Code § 1160.8. Because *Tex-Cal* takes away Abatti's right to court of appeal determination on the merits, Abatti faces the prospect of a court order of enforcement without any court ever having determined that the ALRB order is legal.

As the ALRB would have it, Abatti will receive judicial consideration on the merits — absent action by this Court — only by willfully disobeying the Superior Court enforcement order, being adjudicated in contempt, and hoping to obtain judicial review by writ of habeas corpus.[9] Due process demands that Abatti not be forced to violate a court order, and

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*Footnote continued from previous page*

enforcement proceedings conducted in fiscal years 1974-1978. NLRB, *44th Annual Report for the Fiscal Year Ending September 30, 1979*, Table 19A.

Despite its infancy and the many questions of first impression facing it, the ALRB's "success rate" on petitions for review is much higher. *If* summary denials are counted as "affirmances"—because they leave the order intact—the ALRB was "affirmed" by courts of appeal in an astonishing 87 percent of review cases brought since 1975. Where, however, the writ of review was granted and the court conducted a full review and determination of the merits, the ALRB was affirmed in full in only 42 percent of its cases. *See* Appendix F (10 of 24 opinions written).

Petitioners doubt that the explanation for the ALRB's "success" is that it has in its 8 years of experience developed an adjudicatory expertise far superior to its federal brethren. Petitioners submit the answer to these statistical disparities is simply that a *"Tex-Cal"* type review is something less than full review on the merits to determine the legality and enforceability of ALRB orders.

[9] The ALRB offers Abatti a Hobson's choice:

> [I]f Abatti Farms wishes to test the matter out specifically through the state court [enforcement] proceedings, they can refuse to comply with the Superior Court order of enforcement once it's obtained by the Agricultural Labor Relations Board on the grounds that the order is based upon an unconstitutional decision, and they can take the issues specifically and clearly through the California courts and then to the United States Supreme Court if they wish. . . .

Manuel M. Medeiros, Esq. for the general counsel of the ALRB, in *Abatti Farms, Inc.* v. *Agric. Lab. Rel. Bd.*, Civil Action No. 83-1111-E, United States District Court for the Southern District of California, Reporter's Transcript of Proceedings, Thursday, June 16, 1983 at p. 17.

suffer fines or imprisonment,[10] simply to have some court, somewhere, sometime, determine that the order depriving it of property is legal.

## II. THE ELIMINATION OF ABATTI'S RIGHT TO HAVE A COURT DETERMINE THE LEGALITY OF THE ALRB'S ORDER VIOLATES DUE PROCESS.

Labor Code § 1160.8, as construed in *Tex-Cal* and applied in this case, denies due process for three reasons:

### A. *The ALRA, as Construed, Unconstitutionally Denies Abatti Access to Court.*

A state may not deny access to its judicial process to a litigant seeking to protect a fundamental interest, if resort to the court is the only realistic means of protecting that interest. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), *United States* v. *Kras*, 409 U.S. 434 (1973), and *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). In *Boddie*, this Court analogized litigants who could not become divorced except by access to the courts to defendants "faced with exclusion from the only forum effectively empowered to settle their disputes." 401 U.S. at 376. This is precisely Abatti's plight. Under the ALRA the Court of Appeal is the only forum in which the legality of the ALRB order may be determined. That court's summary refusal to review deprives Abatti of any right to a legal determination of its dispute with the ALRB.

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[10] Contempt, under California law, is not appealable and can be reviewed *solely* by habeas corpus. *Moffat* v. *Moffat*, 27 Cal.3d 645, 656, 165 Cal.Rptr. 877, 883, 612 P.2d 967, 973 (1980); Cal. Code of Civ. Proc. §§ 1222 and 904.1. This Court has held that a party who disobeys a court order and is adjudicated in contempt will not be relieved of that contempt even if the order was improper or based on unconstitutional grounds. *Walker* v. *City of Birmingham*, 388 U.S. 307, 320 (1967); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293 (1947).

B. *California's Elimination of Abatti's Right to Have Some Court Determine that the ALRB Order is Legal Before It is Judicially Enforced Lacks Any Rational Relationship to a Legitimate State Interest.*

Abatti's right to judicial review on the merits under Labor Code § 1160.8, as enacted, is akin to a cause of action and, as such, is protected by the due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also, Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, ___ U.S. ___, 51 U.S.L.W. 4636, 4639 (May 31, 1983).

*Logan* held that state procedural rules which prevent judicial determination on the merits must pass muster under the due process clause. Like the petitioner in *Logan*, Abatti has a property interest in the right to a court determination of the merits of its claim. Like Logan, Abatti was denied a determination on the merits by the imposition of a procedural rule — the *Tex-Cal* elimination of § 1160.8 right to review. As in *Logan*, this procedural rule has prevented a determination of Abatti's claim on its merits.[11]

The vice in *Logan* was that the procedural rule — a 120-day conciliation requirement — deprived Logan of her claim in a "random" manner, presenting an "unjustifiably high risk that meritorious claims will be terminated." 455 U.S. at 434-435. Abatti's deprivation is equally "random," in two respects.

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[11] In *Logan*, the court weighed the state's interest in asserting its procedural rule. In this case, California has no countervailing interest. *Tex-Cal* does not suggest *any* policy reason why ALRB petitioners — unlike every other aggrieved party before California non-judicial agencies, *infra*, — should not be given full judicial review on the merits. On the contrary, *Tex-Cal* truly represents form over substance. The decision turned on the technical niceties between a "Notice of Appeal" and a "Petition for Review" — a distinction which has caused no problem for the federal courts in making minor adjustments to their appeal procedures to accommodate NLRB appeals.

First, *Tex-Cal,* by allowing California courts of appeal to deny, out-of-hand, petitions for review of ALRB decisions, results in good claims as well as bad being randomly rejected without full review and decision.

Second, the ALRB is the *only* California administrative agency that can award damages in an adjudicative proceeding, and get its orders judicially enforced, without *any* judicial determination of the legality of the order. Except for the ALRB, and three California administrative agencies constitutionally empowered to exercise judicial functions,[12] adjudicative decisions of the more than 100 other California administrative agencies are reviewed by writ of mandate or administrative mandamus (Cal. Code of Civ. Proc. § 1085, § 1094.5, respectively) to the Superior Court, where a determination on the merits is guaranteed — either in the Superior Court, or on full appeal, or both. Cal. Code Civ. Proc. § 904.1. There is no valid state purpose for singling out ALRB claimants for exclusion from California's uniform review system.

C. *Due Process Guarantees the Right to Have a Court Determine the Legality of the ALRB's Action in this Case Before its Order May Be Judicially Enforced.*

Where important rights are at stake, due process guarantees judicial review. *Yakus* v. *United States,* 321 U.S. 414 (1944) held that due process demands an "opportunity to be

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[12] The Public Utilities Commission (Cal. Const. art. XII §§ 5 and 6), Workers' Compensation Appeals Board (Cal. Const. art. XIV § 4) and Alcoholic Beverage Control Appeals Board (Cal. Const. art. XX § 22). Judicial review of these agencies is by petition for review subject to summary denial. *Consumers Lobby Against Monopolies* v. *Public Util. Comm'n,* 25 Cal.3d 891, 901, 160 Cal.Rptr. 124, 129, 603 P.2d 41, 46 (1979). Unlike petitioners, litigants before these agencies have had their "day in court" before the judiciary. Abatti recognizes that a state need not provide for judicial review of its constitutional courts. *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956).

heard and for judicial review which satisfies the demands of due process."[13]

In *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936), Justice Brandeis (concurring) said:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.

*St. Joseph* held that legislative actions are

> necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. 298 U.S. at 51-52.

This rule of law extends to administrative determinations. *Crowell* v. *Benson*, 285 U.S. 22 (1932).

Whether a state may shield an administrative agency from any judicial review when its action affects pre-existing rights "is at the very least doubtful . . . ." *Ortwein* v. *Schwab*, 410 U.S. 656, 665 (1973) (Marshall, J., dissenting).[14] As a practical

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[13] Professor Jaffe, in his study of judicial review of agency action, articulated the now familiar "presumption of judicial review":

> "[I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative agency action has a right to secure at some point a judicial determination of its validity." Jaffe, *Judicial Control of Administrative Action*, 336 (1965).

*See, Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

[14] Last term in *Northern Pipeline Construction* v. *Marathon Pipeline Co.*, ___ U.S. ___, 102 S.Ct. 2858 (1982) the Court concluded that only an Article III court can adjudicate private rights. Citing *Atlas Roofing Co. Inc.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), the Court suggested that the Constitution prohibits insulating administrative adjudications from judicial review. ___ U.S. at ___, 102 S.Ct. at 2870-71, n. 23.

matter, access to the judiciary to scrutinize reviewable agency action is universally available on the federal level[15] and almost always provided by the states.[16]

The availability of judicial review has been an essential element in agency adjudication schemes that have passed constitutional muster before this Court. Further, this Court has emphasized the salutary role of judicial review in protecting against a variety of evils.[17] Whether the right to judicial review is a right of constitutional dimension, or simply a very important and almost universally available right, it has become such an essential part of fair administrative adjudicating schemes

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[15] *See* 4 K. Davis, Administrative Law Treatise § 28 (1958) and Supp. (1982) ch. 28. Professor Davis attributes this availability to the existence of District Court federal question jurisdiction (28 U.S.C. § 1331), providing access to court in all federal agency cases where some other method of challenge to agency action is not statutorily mandated. Davis states: "*Reviewable administrative action may always be reviewed under 1331 unless a specific statute provides some other remedy.*" 4 K. Davis, *Administrative Law Treatise*, § 23.7, at 155 (2d Ed. 1983). (Emphasis in original.)

[16] Jaffe, *The Right to Judicial Review II*, 71 Harv. L.Rev. 769, 795 (1958). Jaffe observes that because judicial review is usually available, the question of its constitutional dimensions is "seldom directly presented." (*Id.*) At least six states, including California, have considered whether due process requires a right to judicial review of agency action. Each has, either expressly or by implication, answered affirmatively. *See Idaho Mut. Benefit Ass'n, Inc.* v. *Robison*, 65 Ida. 793, 804, 154 P. 2d 156, 161 (1944); *Fire Dept. of City* v. *City of Fort Worth*, 147 Tex. 505, 509, 217 S.W. 2d 664, 666 (1949); *Dation* v. *Ford Motor Co.*, 313 Mich. 152, 22 N.W. 2d 252 (1956); *Hunter* v. *Zenith Dredge Co.*, 220 Minn. 318, 19 N.W. 2d 795 (1945); *County of Madera* v. *Carleson*, 32 Cal.App.3d 764, 772, 103 Cal.Rptr. 515, 521 (1973), *overruled on other grds*, 31 Cal.3d. 166, 180 (1982); and *Broadriver, Inc.* v. *The City of Stamford*, 158 Conn. 522, 527, 265 A.2d 75, 78 (1970). *See also*, Jaffe, *The Right to Judicial Reveiew I*, 71 Harv. L.Rev. 401 (1958); 4 K. Davis, *Administrative Law Treatise*, § 28.28 (1958); Jaffe, *Judicial Control of Administrative Action* (1965).

[17] See, e.g., *Goldberg* v. *Kelly*, 397 U.S. at 266-267 [to "guide future decisions"]; *Mathews* v. *Eldridge*, 424 U.S., 319, 349 [to assure "fair consideration of" claims]; *NLRB* v. *Jones Laughlin Steel Corp.*, 301 U.S. at 47 [to protect "against arbitrary action"]; and *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. at 51-52 [to assure the supremacy of the rule of law].

that to eliminate it out-of-hand, as California has, for no good reason, is constitutionally impermissible when applied to a private right litigant like Abatti.

When the importance of the right to judicial review—to litigants generally and Abatti in particular — is balanced against whatever interest California may have in the technical niceties of the label on the document required to initiate proceedings before its appellate courts, the balance must be struck in favor of Abatti under the due process clause. *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).[18]

## III. THE ALRA, AS CONSTRUED AND APPLIED, IS UNCONSTITUTIONAL UNDER *MARBURY* v. *MADISON* AND THE FIRST AMENDMENT.

Stripped to its essentials, the constitutional vice of the ALRA scheme, as applied to Abatti, is that it *requires* the Superior Court to enforce an unadjudicated executive branch order, but *prohibits* it from determining the lawfulness of the order before enforcing it. It mandates that the judiciary place its imprimatur on executive deprivation regardless of whether the executive acted lawfully. It destroys the fundamental constitutional function of the judiciary—to determine the lawfulness of executive action depriving citizens of property (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) *137* (1803)), and renders meaningless Abatti's First Amendment right to judicial determination of its claim. *See Bill Johnson's Restaurants, Inc.*, 51 U.S.L.W. at 4639. Abatti asks only that some court, somewhere, *tell* it whether the ALRB order is valid.

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[18] The "pre-deprivation hearing cases" of the 1960's and 1970's further underscored the importance of judicial review as an element of procedural due process. *See, e.g., Snaidach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). As construed by the California Supreme Court, the procedural protections afforded by the ALRA are constitutionally inadequate under the test enunciated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), since the unconstitutional denial of access to the judiciary could be eliminated by requiring that existing appellate procedures be made available to petitioner.

## CONCLUSION

Mindful of this Court's teaching in *Johnson v. Robison*, 415 U.S. 361, 366-367 (1974), that a statute should be construed, whenever possible, consistent with constitutional dictates, the deprivation of due process which results from *Tex-Cal* can be repaired by directing that the California Court of Appeal reverse, modify or affirm Abatti's case on the merits, and give Abatti its day in court.

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Respectfully submitted,

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